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JOHN T. FEY,

IN THE

Supreme Court of the United States

October Term, 1956

No. 245 MISC.

SAM MCHONEY, HERBERT DUNMEYER, JOHN SMITH, FRANKLIN WHITE, ROBERT JENKINS, CHAPEL MOUZON, LIMON JOYNER, FELIX MCKNIGHT, LUTHER MOORE, THOMAS BURCH and JOHN BOWENS,

Petitioners,

—v.—

MARINE NAVIGATION COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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MARINE NAVIGATION COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on the 23rd day of May, 1956 and the order denying the petitions for rehearing entered on the 11th day of July, 1956.

Opinions Below

The opinion of the United States District Court for the Eastern District of South Carolina (Charleston) is officially reported in 137 F. Supp. 263. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 233 F. 2d 769 and appears on page 212 of the Transcript of Record.

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Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, sections 1254 (1) and 2101 (c), as well as Rule 19 (b) of the Rules of the Court under the Court's power of supervision over the Federal Judicial System, and more particularly on the grounds that the Court of Appeals for the Fourth Circuit has rendered a decision on a question which has not been, but should be settled by this Court and is also in conflict with the decisions of this Court and other Courts of Appeal and in opposition to a construction and application of a safety regulation of the United States Coast Guard given by the Commandant charged with its definition and enforcement.

Questions Presented

1. The sole question considered by the Court of Appeals was—"Did the District Court err in failing to charge the jury as a matter of law that the United States Coast Guard Regulation referring to sulphur as a dangerously inflammable cargo and requiring a 'fire hose supplied with fresh water from a shore supply source' at each hatch, was applicable herein during unloading of sulphur, and that the violation thereof constituted negligence per se?" Was there error on an affirmance that rejected the construction of said regulation made by the Commandant of the United States Coast Guard pursuant to statutory authority, and accepted by the trial Judge as obvious and necessary for the safety of longshoremen who discharge bulk sulphur from the hold of a vessel?

2. Should the manner of interpretation of a Coast Guard regulation by the Court of Appeals, adverse to the eleven petitioners and affecting all maritime workers, be allowed to stand? Further, where the principal basis for the restricted interpretation of a safety regulation is that penal

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provisions might apply to the shipowner, would this not seriously hamper the proper observance and administration of all Coast Guard regulations?

3. As the Commandant's interpretation and its acceptance by the trial Court was the basis of the stipulation severely limiting the issue on appeal, did the Court below err in denying the petition for rehearing which sought to present further argument on the record on appeal wherein clearly appears from incontrovertible physical facts and admissions by the shipowner that the permanently crippled longshoremen, who did not contribute in any wise to the fire and the toxic sulphur fumes resulting therefrom, were clearly and unequivocally deserving of judgment notwithstanding the verdict, or in the alternative, a new trial?

Statutes and Regulations Involved

Under 46 U. S. C. 170, captioned "Regulation of carriage of explosives or other dangerous articles on vessels.—Vessels defined," appears section (7), in pertinent part as follows:

> "In order to secure effective provisions against the hazards of health, life, limb or property created by explosives or other dangerous articles or substances to which subsection (3), (4), (5), or (6) of this section apply—
>
> (a) The Commandant of the Coast Guard shall by regulations define, describe, name, and classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section. * * *"

The extract from Table K of the Coast Guard Regulation effective February 5, 1952 and applicable at the time of

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the fire involved herein is set forth at length in the opinion below, and in pertinent part reads in its main heading and one sub-section as follows:

> "In the loading or unloading of sulphur in bulk the following conditions shall be complied with:
>
> * * * * *
>
> (g) A fire hose, supplied with fresh water from a shore supply source, shall be available at each hatch through which sulphur is being loaded."

The Court below also referred to the following section (15) of 46 U. S. C. 170:

> "(15) When the death or bodily injury of any person results from the violation of this section or any regulations made in pursuance thereof, the person or persons who shall have knowingly violated or caused to be violated such provisions or regulations shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Also referred to by the Court below was an amendment to sub-section (g) of the pertinent regulation after the accident involved herein, which now reads as follows:

> "(g) A fire hose, preferably supplied with fresh water from a shore supply source, shall be available at each hatch through which sulphur is being worked."

This amendment is announced in Volume 20, Number 113 of the Federal Register, dated June 10, 1955, on page 4052, as follows:

> "The amendments to Subpart-Detailed Regulations Governing Hazardous Articles (46 CFR 146.27) provide for additional containers for Manganese Dioxide, and

stantial rights of petitioners, where it affirmatively appears from the record that the shipowner's violation of the regulation was proximately related to the injuries sustained.

United States Coast Guard Regulation 146-27-100, Table K, Classification:—Hazardous Articles (N-347), published by the Treasury Department, United States Coast Guard, Washington, D. C., April 9, 1944, revised July 17, 1950, referring to sulfur as "dangerously inflammable," reads in pertinent part as follows:

> "In the loading or unloading of sulfur in bulk the following conditions shall be complied with:—
>
> • • • • •
>
> (g) A fire hose supplied with fresh water from a shore supply source shall be available at each hatch through which the sulfur is being loaded."

Respondent contended at the time of trial that this regulation was not applicable while the longshoremen were engaged in unloading sulfur, as the word "unloading" did not appear in sub-paragraph (g). Petitioners' trial counsel offered in evidence telegraphic communications to and from the Commandant, U. S. Coast Guard, wherein appears his answer that:

> "LOADING AND UNLOADING BULK SULPHUR SAME HAZARDS PREVAIL WHILE UNLOADING AS WHILE LOADING SULPHUR THEREFORE PARA G APPLIES" (Plaintiffs' Exhibit 11, 139a).*

Over defendant's objection, the trial Court admitted the wires in evidence. This was on November 24, 1954, eight days before the charge to the jury and the verdict for de-

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* Numbers in parentheses with suffix "a" are page references to petitioners' appendix to brief in Court below; those with suffix "A" refer to respondent's appendix below.

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fendant on December 2, 1954. The following colloquy, before the Thanksgiving recess, is the only reference by the trial Court in the presence of the jury concerning its reserved interpretation of this regulation:

> "The Court: Mr. Hollings, I have given considerable thought to this matter in view of the testimony that has been offered, and yesterday I wasn't in a position to give any interpretation of it. But regardless of this statement here, *if it is left to me to interpret it,* I would conclude, in view of the testimony that has been offered, that it applies to loading and unloading.
>
> Mr. Hollings:* Then, if your Honor please, what is the ruling as to Plaintiffs' Exhibit 11?
>
> The Court: I see no objection to offering it because *I am going to rule* that this is a proper interpretation * * *" (137a, 138a, emphasis supplied).

This ruling on the offered exhibit was never subsequently commented on by the trial Judge in the presence of the jury, nor was it ever clearly and unambiguously expressed as an instruction that the jury was compelled to follow.

At the close of all testimony, prior to charging the jury, the trial Court refused plaintiffs' request to charge the jury that "* * * the regulation of the Coast Guard requires a connection with a shore water source, while loading as well as unloading sulfur," as follows:

> "The Court: You are going to argue that question. I want to leave out of the charge anything that *relates to the facts.*
>
> Mr. Klonsky: *That is a question of law, Your Honor,* you are interpreting a law, a regulation.

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* Mr. Hollings and Mr. Klonsky were trial counsel for the plaintiffs; Mr. Waring and Mr. Connor were trial counsel for the defendant.

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The Court: *I don't look at it that way.*

Mr. Klonsky: All right, sir. *Please note an exception for the plaintiffs"* (108a, emphasis added).

The colloquy following the charge clearly shows that the Court did only invite "other requests," affirmed the recording of prior exceptions, and that the exception by plaintiffs' counsel to the refusal to instruct the jury was not withdrawn, as follows:

"The Court: I believe there are no *other Requests* to Charge, are there?

Mr. Klonsky: No, your Honor (30a).

• • • • •

Mr. Waring: I am just asking that the record show that the *exceptions made and discussed with the Court in connection with the charge shall apply to the charge as given.*

The Court: Yes, *that is satisfactory.* Didn't you have an exception?

Mr. Klonsky: *I have no exceptions,* your Honor.

The Court: No, you just had a motion.*

Mr. Klonsky: That is right, sir" (32a, emphasis added).

By reason of the Court's refusal to charge, defendant's counsel was thereby licensed to speculate with the jury in his summation as to whether the regulation "in fact" applied to unloading sulphur (109a).

The error is accentuated by the statement on record by one of respondent's trial counsel, out of the hearing of the jury while agreements and disagreements were being recorded, as follows:

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* Referring to plaintiffs' motion for a directed verdict at the close of proof.

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"Mr. Connor: Let's put it this way: If the regulation was unambiguous—and to give the Coast Guard the benefit of the doubt, I say it isn't ambiguous at all. It is clear and simple.

Mr. Klonsky: That is what the Commandant of the Coast Guard said in the communication to us.

Mr. Connor: I would agree that if the regulation about which this matter has turned included the words 'or unloading' and we failed to observe that particular paragraph, the ship would be negligent" (103a, 104a).

There was no hose at the particular hatch connected to a shore supply of fresh water where pressure would have been available, immediate and sufficient. This is corroborated by all the testimony, particularly by the Ship's Master Karl Sietz, who testified in an examination of the defendant before trial as follows:

"Q. Did you have a fire hose supplied with fresh water from a shore supply source? A. No, we did not.

• • • • •

Q. There was no connection between any water supply going to this hose and any shore facility, was there? A. No" (37a, 38a).

Though defendant's proof by itself was sufficient to support a plaintiffs' judgment notwithstanding any verdict, the Court below, on considering the motion, made this significant statement:

"The Court: I don't think there is any question about it, taking the plaintiff's testimony, without any other testimony, the ship was liable" (120a).

On appeal, the Court below disagreed with the titular chief draftsman of the pertinent regulation, the Commandant of the U. S. Coast Guard, as well as the trial Judge,

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and disposed of the appeal without consideration of the issues related to liability predicated on physical facts and admissions that prompted plaintiffs' motion for a directed verdict at the close of the case, and thereafter, a motion for judgment notwithstanding the verdict, or in the alternative, a new trial. There is no reference in the appellate opinion below as to the unequivocal interpretation of the regulation applying during "unloading" as made by the Commandant during the course of trial, but on the contrary, the opinion states that the draftsman must have meant the opposite, with an admission that the Court's contrary interpretation was arrived at without any prior decisional authority, as follows:

> "We, therefore, think that the preliminary statement that the prescribed conditions apply to 'the loading *or* (a disjunctive conjunction) unloading of sulphur', followed by specific provisions, some of which apply to loading, others only to unloading, and some to both operations, show clearly that the draftsmen of the Regulation clearly recognized the difference between the loading and unloading of sulphur and for these two operations they prescribed different precautions. Thus, in sub-section (g), which is before us, it is definitely stated that 'A fire hose * * * shall be available at each hatch through which the sulphur is *being loaded.*' (Italics ours.) Not a mention of 'unloading'. *Expressio unius est exclusio alterius.* There appear to be no decided cases directly in point here."

Stating that the safety regulation "should not be expansively interpreted" by reason of the penal provisions of the regulation, the appellate Court below cites *Kordel* v. *United States,* 335 U. S. 345, a case concerned with the review of a judgment affirming a conviction for introducing misbranded drugs into interstate commerce, and *Schmokey* v.

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United States, 182 F. (2d) 937, a case concerned with a conviction for embezzlement.

Also in the appellate opinion below is discussion of the amended sub-section (g), admitting that it now clearly applies to "the loading and unloading of sulphur," but nonetheless upholding respondent's contention "that the amendment changed the meaning of sub-section (g) and for the first time brought unloading within the ambit of the subsection."

In Volume 20, Number 113 of the Federal Register, dated June 10, 1955, on page 4052 thereof, appears the following:

> "The amendments to Subpart-Detailed Regulations Governing Hazardous Articles (46 CFR 146.27) provide for additional containers for Manganese Dioxide, *and editorial changes to the note regarding 'Sulfur'* (46 CFR 146.27-100)." (Emphasis added.)

It is significant that the editorial changes followed the trial and communications with the Commandant, and were not based on a public hearing for the purpose of effecting any change of intent thereof, as would be required under section (9) of 46 U. S. C. 170.

The appellate opinion below concludes, without reference to the record, that there was "abundant evidence from which the jury could have found that there was an adequate supply of water from the shore which was actually used to extinguish the fire," and that though the trial Judge should have interpreted the regulation and not the jury, "he stated in the presence of the jury that, in his opinion, the Regulation applied to unloading as well as loading but left this question to the jury in his formal charge, to which no exception was taken," and finally, that there was no error in failing to charge the jury that sub-section (g) was applicable to the unloading of sulphur.

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There is contained *supra* those portions of the record pertinent to whether the trial Judge adequately instructed the jury as a matter of law as to the interpretation of the regulation, and also as to whether or not petitioners' trial counsel recorded a timely exception. It is also significant that the petitioners' counsel had presented a proposed charge wherein this interpretation was contained, and deleted by the trial Judge from his final charge, as set forth on page 22-A of respondent's appendix. The balance of this "Statement of the Case" will be concerned with a concise presentation of the physical facts and admissions by respondent's witnesses for this learned Court's determination as to whether there was that "abundant evidence" to support the judgment below.

At the time of the fire the longshoremen were in the lower hold and wings of the #2 hatch, having already discharged more than three-quarters of the crude bulk sulfur (36a, 37a). The bulkheads and 'tween deck in the hatch had been previously sprayed with red lead and fish oil (37a). There was no fire hose supplied with fresh water from a shore supply source (37a), and the ship's hydrants on the main deck were able to bring forth river water by starting pumps in the engine room (14a, 38a).

The ship's Master, Sietz, reported to the United States Coast Guard that the fire started at 5:10 P. M. and that about 5:30 P. M. the last longshoreman in the hold "had found his way out" and that by 5:40 P. M. the fire was completely extinguished (40a). That eleven longshoremen were taken to a hospital, nine released and two retained for further treatment (40a).

The entry made by the local fire department concerning the fire is as follows:

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"February 5, 1952

SS MARINE MERCHANT—Columbus St. Dock, Telephone call received at 5:10 P. M., on arrival of Company #7, found sulphur afire in #2 hole of ship, caused by sparks from steel bucket striking side of hatch of ship. A radio call was also received for a foamite truck and a resusciator. Company #3 responded with the foam generator and company #2 responded with the Resusciator. The resusciator was used for 20 minutes on Herbert Dynmeyer, colored, who was overcome by sulphur fumes, he was revived and sent to Roper Hospital. Agent for ship—Carolina Shipping Company. Fire was extinguished with 20 gallons of foamite and 1 engine stream. Companies 2, 3 7 service truck and Battalion Chief responded.

Damage ? Alarm by citizen"

(Plaintiffs' Exhibit 18, 142a.)

Fire Battalion Chief E. T. Garris of the Charleston Fire Department testified that when he and his men arrived he saw no ship's hose directed on the fire, that the fire was fought with fire department foamite and water for about twenty minutes, with smoke coming out of the hold "pretty strong," and that the last company report was made 45 minutes after arrival. William L. De Witt, a local fireman, testified that he was overcome by smoke when he was only halfway down the single escape ladder, while attempting to rescue the trapped longshoremen.*

A witness for the defendant, Anthony J. Arent, identified in the answers to interrogatories as the Second Assistant Engineer on duty in the engine room at the time of the

* This paragraph without reference to record was part of brief to Court below pursuant to its Rule 10-2(c) that facts can be set forth in this manner if unquestioned by parties.

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accident, testified at the time of trial that, in fact, he was not in charge of the engine room at the time of the fire (122a). He stated that a night relief engineer was in charge where the ship's pumps were located (122a, 123a), and that he was on the boat deck, above the main deck, when he saw smoke coming from the #2 hatch. Instead of ringing the general alarm nearby, he went down to the engine room where he touched a steam valve on the fire pump to increase pressure already on the line. That it took him about two minutes to come down from the main deck and in that time he did not hear the general alarm (125a, 126a). It was his testimony that when there is some pressure maintained on the line, full pressure would go on in thirty seconds or less, and that while he increased the pressure already there the night engineer was right in back of him "all this time" (126a, 127a).

This Night Relief Engineer J. T. McGlothlin, is found in the Engineer's Log Book *as first having signed in for duty at 8:00 P. M.*, approximately three hours after the fire was discovered (141a). From this it is apparent that the Night Engineer was not on watch at the time Arent went to the engine room, the latter having left a position on the boat deck where he could have himself sounded the alarm and communicated with anyone maintaining pressure on the ship's pumps in the engine room by ship's telephone. This significant log entry shows that there was no one to maintain pressure on the line so as to enable Arent to turn on full pressure of pumps already in operation, within thirty seconds.

Defendant's expert in chemistry, Mr. William Schirmer, gave testimony to show on the physical facts that the sulfur fire was caused to spread, and cause extensive physical damage, by reason of the shipowner's violation of the pertinent Coast Guard regulation which provided for immediate pressure and fresh water from a shore source "at

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each hatch." The major points of his testimony, without contradiction, are as follows:

1. Sulfur is slow burning and could be easily extinguished (86a).

2. Fish oil in the hold would burn (94a).

3. The use of river or sea water would generate a certain amount of hydrochloric acid (87a).

4. On the basis of one pound of sulfur burning in the area of the hatch area the concentration would be 120.6 parts per million, and that he had experienced no ill effects with the concentration up to 300 or 400 parts per million (86a, 88a), it necessarily follows that the fire must have been allowed to spread and become extensive so as to cause such pulmonary injuries as required hospitalization for all petitioners and the use of a resuscitator for twenty minutes on at least one. (The permanent injuries are more extensive than the record shows, and reports by the shipowner's examining doctors to this effect were known to the trial Judge.)

The trial Court's opinion refers to testimony by two of the employees of the stevedoring company "that a hose with fresh water from a shore supply source was lying upon the dock near the No. 2 hatch and that this hose was promptly brought into action after the fire began" (10a, 11a). This conclusion is adopted without discussion by the appellate opinion below. With respect to this dock hose, not meant to be available at any particular hatch, Frank Mathis, one of these two men referred to in the opinion and a witness for the shipowner, testified clearly as to the inadequacy of this hose, the unavailability of ship's hoses, and the delay in applying water to the slow burning sulfur fire.

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Mathis testified that after noticing smoke coming from the No. 2 hatch he went to the ship's hose box and found it coiled up and unavailable for prompt use, that the ship's hydrants were turned and no water came out, and that he was compelled to go to the dock for a hose that wasn't long enough to get to the hatch (149a). In part Mathis' testimony is corroborated by the other employee of the stevedoring company referred to in the initial opinion, one Willie Butler, who testified that the longshoremen were compelled to go to the dock for a hose before the ship's hoses could be put on the fire, and neither witness could state how long before the local Fire Department arrived at the scene that any water had actually been applied to the fire (149, 150).

Other items of unseaworthiness and negligence causing or contributing to the proximate cause of petitioners' permanent injuries, to which they did not contribute in any way, would greatly expand this statement, perhaps unnecessarily in the light of what has already been stated. They all point to the respondent's unquestioned violation of the U. S. Coast Guard regulation and the negligent increase of the magnitude of risk to which the longshoremen discharging the extrahazardous cargo of crude sulfur were exposed.

Reasons for Granting the Writ

1. The interpretation of the safety regulation involved by the appellate Court below is at variance with the agency which promulgated the regulation in accordance with statutory authority. If this interpretation is permitted to stand it will represent a serious hindrance to the effective administration of the law by the agents charged with its enforcement.

2. The Court below states that "there appear to be no decided cases directly in point here" as regards the manner in which the interpretation was resolved in direct opposition to the construction by the Commandant of the U. S. Coast Guard and the trial Judge, thereby demonstrating that the issue is novel and will be involved in numerous cases pending under all Coast Guard safety regulations. It is desirable that there be an early and definitive ruling by this Honorable Court to resolve conflicts certain to arise with respect to the construction or application of a maritime safety regulation by the agent empowered by statute to do so, and any Court which would subvert consideration of paramount issues of liability to a strained and contrary interpretation of any regulation designed for the safety of longshoremen and harbor workers.

3. There is no class of maritime workers greater in number than longshoremen who load and discharge cargo on ships, and together with the eleven petitioners, importance is demonstrated by the fact that many individuals are affected by the decision below, which decision erroneously limits its interpretation by reason of penal provisions that might apply against a culpable shipowner and is in complete disregard of the physical facts and uncontroverted admissions by the shipowner herein and its witnesses that but for the violation of the regulation involved, and other breaches of the warranty of seaworthiness, the serious and permanently disabling injuries of petitioners could not have been sustained.

ARGUMENT

The novel and retrogressive interpretation by the Court of Appeals of a safety regulation for all longshoremen requiring at each hatch through which sulfur is being loaded "a fire hose supplied with fresh water from a shore supply source," particularly as to the manner of interpretation that will seriously limit the authority of the agent authorized to promulgate, define and enforce all safety regulations, and cripple the effectiveness of such regulations designed as humane and necessary, deserves the consideration attendant on granting the petition herein.

The Commandant of the United States Coast Guard, as the principal agent empowered by statute to promulgate, define and enforce safety regulations for the benefit of longshoremen who work in extrahazardous places with extrahazardous cargo aboard merchant ships, must not be frustrated in his fair and reasonable construction of a regulation designed to promote safety, where the admitted violation of the regulation as so defined is proximately related to severe disabilities sustained by petitioners.

The appellate Court below did disregard the Commandant's interpretation, and substituted a strained and erroneous construction to defeat the unequivocal definition that the crucial paragraph "g" means that as to the dangerously inflammable bulk sulfur cargo the "same hazards prevail while unloading as while loading sulphur therefore Para G applies." The regulation itself requires a fire hose "at each hatch *through which* the sulphur is being loaded," not "in which" it is being loaded, clearly justifying the Commandant's interpretation where the sulfur was in fact being loaded through the hatch onto railroad cars at an adjacent siding.

Though conceding the manner of its interpretation of the pertinent regulation is *res integra,* the appellate opinion below cites a decision of this Court and one of the Tenth Circuit Court of Appeals to support its restricted construction. Neither of these cases concerns a safety regulation. In *Kordel* v. *U. S.,* 335 U. S. 345, a review of a conviction for introducing misbranded drugs into interstate commerce, this Court stated on page 349 as follows:

> "But there is no canon against using common sense in reading a criminal law, so that strained and technical constructions do not defeat its purpose by creating exceptions from or loopholes in it."

In *Schmokey* v. *U. S.,* 182 F. (2d) 937, concerned with a conviction for embezzlement, the Court stated on pages 937 and 938, as follows:

> "A criminal statute must be strictly construed and not extended in its operation to persons not within its descriptive terms *or the fair and clear import of the language used.*" (Emphasis supplied.)

Petitioners contend that the very cases cited in support of the interpretation by the Court of Appeals herein are actually in conflict therewith.

The substance of these cases, however, is a far cry from the purpose and effect of safety regulations and the penal provisions therein designed to effectuate enforcement. Great harm will result to any effective enforcement of such regulations if the provisions designed to give them teeth are the basis of their debilitation. Though the regulation in point is enforceable by a penal provision, it is clear in Title 46 U. S. C. A., Section 170, subsection 7 (15) that punishment follows only when there are "persons who shall have knowingly violated or caused to be violated



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The plain errors are resolved from a verdict prompted by a vague and misleading charge by the Trial Court, found to be erroneous by the Court of Appeals; as well as a record that unquestionably demonstrates the shipowner's liability irrespective of any jury verdict, which the Appellate Court below erroneously failed to consider.

The major point on appeal below was that the trial Judge's ruling on an exhibit could not be deemed a definitive instruction to the jury on the United States Coast Guard regulation as a matter of law, and therefore it followed that the refusal to charge on this crucial matter constituted reversible error.

On this the opinion below actually agrees, as follows:

> "It is true that the interpretation of the regulation was a matter for the Judge and not the jury * * *."

Reversal was refused, however, by concluding without reference to the record that "he left this question to the jury in his formal charge, to which no exception was taken." Clearly an exception was taken on this very refusal to charge, in the following clear and concise language:

> "Please note an exception for the plaintiffs" (108a).

The position of plaintiffs to the refusal to charge as they proposed, and specifically deleted by the trial Judge on the ground "that relates to the facts," was unquestioned. Where a point is made clearly, plaintiffs' counsel did not even have to formally except, though he did. This is the proposition of law in the Court of Appeals for the Second Circuit in the case of *Keen* v. *Overseas Tankship Corporation*, 194 F. (2d) 515, 519, and where it conflicts with the

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appellate opinion below, there is additional reason for a review by this learned Court.

There is also disregard of the long established principle that it is error to submit a question of law to the jury. *McFadden* v. *Parker,* 4 U. S. 275, 4 Dall. 275; *Hickman* v. *Jones,* 76 U. S. 197, 9 Wall. 197; *Parks* v. *Ross,* 52 U. S. 362, 11 How. 362.

The Court below would excuse the failure to charge on the ground that "During the course of the trial he stated in the presence of the jury that, in his opinion, the Regulation applied to unloading as well as loading * * *," where this comment was actually circumscribed by the remark of the trial Judge "If it is left to me to interpret it * * *" Not only does this conflict with the decisions of this Court cited above, but it also does violence to the accepted definition and proper application of a "charge to the jury." See *Corpus Juris Secundum,* Vol. 88, Section 266, page 725, West Publishing Co., 1955 and 53 *Am. Jurisprudence,* Trial, Section 555, wherein is distinguished an instruction from controverted matters of fact, and that instructions which tend to confuse the jury in the consideration of the issues in the case are grounds for a new trial or reversal.

Where the instruction is confusing and ambiguous, as in the instant case, and admitted as such by the appellate opinion below, regardless of the issue of the omission of the Commandant's interpretation, the parties here were "entitled to have the jury plainly and correctly instructed so that there will be no misapprehension as to the law of the case." *Atlantic Coast Line R. Co.* v. *Dixon,* 189 F. (2d) 525, 528, cert. den. 342 U. S. 830.

Also see:

McCandless v. *United States,* 298 U. S. 342, 347, 348;

Lynch v. *Oregon Lumber Co.,* 108 F. (2d) 283, 286.

The interpretation of the regulation as a matter of law would have established the shipowner's legal obligation to the longshoremen, without which the jury could not determine the relationship of this obligation, and its breach, to the proximate cause of the injuries.

After the appellate opinion below, petitioners sought a rehearing of the decision on the ground that "the interpretation below, found to be erroneous, was also the basis of reliance by appellants on appeal," and "Petitioner therefore respectfully requests leave to present for the learned Court's consideration such additional proof and testimony as had been set forth in appellants' designation of the record on appeal, in the firm belief that the error found by this Court is not alone in a more comprehensively presented record." In the petition, which is part of the papers forwarded to the Clerk of this Court, is set forth the reasons that compelled petitioners to stipulate to the limited issue on appeal. Said petition was denied without opinion, and the Court of Appeals refused to consider the record before it beyond the scope of the limited stipulation itself. Rule 32 of the Revised Rules of the Supreme Court of the United States allows a review on a more complete record.

Petitioners believe that even on the limited issue there is no substantial justice without reversal. For the sake of a full determination on the designated records by both parties, however, petitioners additionally contend that irrespective of the interpretation of the regulation, liability must

follow from the following physical facts and uncontroverted admissions by the shipowner and its witnesses:

1. The slow burning sulfur would not have spread to its extensive proportions, were it not for the failure of the shipowner to furnish petitioners with a safe and seaworthy place to work, particularly ship's hoses with water readily available, which was not available because the ship's log undeniably shows that no crew member, including the Night Engineer, was on duty at the time.

2. Also, the presence of readily inflammable fish oil in the hold wherein was contained bulk sulfur, designated as "dangerously inflammable," coupled with a single escape ladder to the main deck, contributed to and compounded the magnitude of risk to which the longshoremen were negligently subjected.

Even these were deleted from the charge as issues to be determined by the jury. The charge of the trial Court, therefore, failed to apprise the jury of the questions involved and the rules of law applicable thereto, which charge was the result of deleting significant and major portions of the proposed charge drawn up by plaintiffs' counsel at the Court's request, and in effect constituted plaintiffs' requests to charge. All other items of proof set forth in the record, not considered by reason of the strict limitation of the issue on appeal as construed by the Court of Appeals, separately and collectively must leave the Court with a definite and firm conviction that a mistake had been committed. To this is recorded the express exception to the charge and the implied exceptions where the trial Court rejected pertinent portions of plaintiffs' requests to charge.

This learned Court has in recent years frequently recognized the national importance of the maritime industry in its various phases, including stevedoring. The instant case

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presents issues of unquestioned liability, and error on error in both lower Courts concerning an interpretation that had been correctly and necessarily made by the Commandant of the United States Coast Guard pursuant to statutory authority.

WHEREFORE, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

PHILIP F. DICOSTANZO,
Counsel for Petitioner.

ROBERT KLONSKY,
On Petition and Brief.

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FILE
SEP 27
JOHN T. FEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 245 Misc. O. T. 1956.

SAM McHONEY, HERBERT DUNMEYER, JOHN SMITH, FRANKLIN WHITE, ROBERT JENKINS, CHAPEL MOUZON, LIMON JOYNER, FELIX McKNIGHT, LUTHER MOORE, THOMAS BURCH and JOHN BOWENS,

Petitioners,

vs.

MARINE NAVIGATION COMPANY, INC.,

Respondent.

BRIEF OF RESPONDENT, MARINE NAVIGATION COMPANY, INC., IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI AND APPENDIX.

Parkside Press, Inc., 32 Thomas St., New York 7, N. Y., U. S. A.

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BRIEF OF RESPONDENT, MARINE NAVIGATION COMPANY, INC., IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of South Carolina is officially reported in 137 F. Supp. 263. The opinion of the United States Court of Appeals for the Fourth Circuit is officially reported in 233 F. 2d 769.

JURISDICTION.

It is not disputed that there is jurisdiction under Title 28 USC Sections 1254 (1) and 2101 (c). However, the peti-

tion fails to establish that there exists any of the grounds for granting a writ set forth in Rule 19 of the Revised Rules of this court.

Although this court is asked to review an alleged failure of the Trial Judge to charge the legal effect of a regulation of the Coast Guard, no request was made to the Trial Judge to charge the regulation according to its terms. Moreover, no exception was made to the alleged failure so to charge (Petitioners' Appendix in Court of Appeals, 30a, 32a).

Thus, irrespective of the correctness of the interpretation of the regulation by the Court of Appeals, Petitioners never properly raised objection to the charge as required by the Federal Rules of Civil Procedure, Rule 51, which reads in part as follows:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Statement of the Case.

It is necessary to state at the outset that the Petitioners take many liberties with the facts and they frequently refer to matters completely outside the record. Therefore, this court cannot accept the Petitioners' statements and arguments as reliable guides as to the proceedings below.

The SS *Marine Merchant,* owned by the Respondent, was chartered by The Texas Sulphur Company to transport a cargo of bulk sulphur to the Port of Charleston. The charterer employed James Doran Company as the stevedore to unload the cargo and the Petitioners were longshoremen in the employ of the stevedore.

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After the vessel was docked, the stevedore took charge of those parts of the vessel necessary to the unloading of the cargo, including the ship's apparatus which was to be used in lifting the stevedore's metal buckets from the hold to the dock. The function of the Petitioners was to shovel loose sulphur from the hold into the lowered buckets. At 5 o'clock in the afternoon of February 5, 1952, while this operation was in progress, a fire occurred in the #2 hold where the Petitioners were working.

The Petitioners brought this suit against the Respondent, alleging that they received injuries as a result of the fire and asserting that the injuries so received were due to the unseaworthiness of the vessel and the negligence of the Respondent in various particulars. Respondent denied the material allegations of the complaint. The cause came on for trial before a United States District Judge and a jury in the United States District Court for the Eastern District of South Carolina. It was agreed by the parties, with the approval of the Court, that the only questions to be resolved at the trial were whether the ship was unseaworthy and whether the Respondent was guilty of negligence. The outcome of the trial was a verdict by the jury which found for Respondent, answering, in the negative both of the questions submitted.

During the course of the trial, the Petitioners attempted to show that the ship's apparatus was not in proper working order and that this caused a bucket to strike a metal part of the ship, thereby making a spark which set off the fire. The Petitioners also attempted to show that in other respects the Respondent was negligent or the vessel was unseaworthy. Respondent introduced considerable testimony which established that the ship's apparatus was in no respect inadequate or defective and that there was no fault on the part of the Respondent in respect to any of

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the matters claimed by Petitioners. By its verdict the jury found that defendant was not negligent and that its vessel was seaworthy.

The Petitioners also charged that the Respondent failed to "connect the ship's water connections with a shore supply source of water" and argued that such failure constituted a violation of the Coast Guard regulation (13a)* which read in part as follows:

> "A fire hose supplied with fresh water from a shore supply source shall be available at each hatch through which the sulfur is being loaded."

Respondent maintained that by its very terms the regulation did not apply to the *unloading* operation then in progress and established by uncontradicted testimony that, in any event, the regulation was not violated since there was available and put into use a fire hose leading from the dock to the hold of the ship, which hose was supplied with fresh water from a shore supply source.

The Trial Court ruled that the Coast Guard regulation was applicable to *unloading* and so instructed the jury. However, the Court refused to charge that the regulation required a "connection" from the shore with the ship's water supply, because the regulation required only that the hose be "available". At the completion of the charge, the Court asked counsel for both parties whether there were any other requests to charge or any exceptions and counsel for the Petitioners stated that they had no further requests and no exceptions (30a, 32a; Record in the Court of Appeals).

Upon the verdict of the jury, the trial court entered judgment for the Respondent. The Trial Court denied Peti-

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* References are to the Appendix attached to this brief.

tioners' motions for a new trial or, in the alternative, judgment notwithstanding the verdict. The United States Court of Appeals for the Fourth Circuit affirmed the judgment.

A stipulation* was entered into by the parties, setting forth the sole question on appeal and the contents of the record on appeal. The sole issue on appeal from the judgment in the District Court was the following (1a):

> "Did the Court below err in failing to charge the jury as a matter of law that the U. S. Coast Guard regulation, referring to sulfur as a dangerously inflammable cargo and requiring a 'fire hose supplied with fresh water from a shore supply source' at each hatch, was applicable herein during unloading of sulfur, and that the violation thereof constituted negligence *per se*?"

The testimony and exhibits set forth in the stipulation related only to the sole issue which Petitioners desired to raise on appeal.

The Court of Appeals held that the regulation was inapplicable to *unloading* operations and that there was no error on the part of the Trial Judge in failing to charge the jury in the respect complained of on appeal. The Court of Appeals also stated in its opinion that the question of Respondent's negligence was fairly submitted to the jury which found a verdict against the Petitioners and that there was abundant evidence from which the jury could have found that there was an adequate supply from the shore of fresh water which was actually used to extinguish the fire. The judgment of the District Court was affirmed by the Court of Appeals, which later denied Petitioners' application for rehearing. This Petition followed.

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* Printed in the Appendix to this brief, pp. 1a-12a.

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Questions Presented.

The questions for consideration on this Petition are:

1. Whether this Court should review the holding by the Court of Appeals that the Coast Guard regulation (now amended) did not by its terms apply to *unloading* of sulfur.

2. Whether this Court should review the affirmance by the Court of Appeals of the judgment of the District Court because the Trial Judge did not charge that the old regulation required a "connection" between the shore and the ship's water system, particularly where the proof showed that there was a shore fresh water hose available and actually used to extinguish the fire.

Respondent's Proof.

On the trial, Respondent showed that at 8 A. M. on the morning of the fire, which occurred at 5 P. M., the ship's crew had laid out one of the ship's hoses alongside the #2 hatch. It was in this hatch where the fire developed. The nozzle was hung over the side of the ship through a chock with water dribbling through it (11a).

When the fire broke out, the ship's alarm was immediately sounded and the ship's crew responded promptly (10a, 11a). While the second assistant engineer hurried to the engine room to increase the pressure on the ship's pump (10a), the mate and other members of the crew went immediately to #2 hatch where two of the ship's hoses were manned and water from them played on the fire (11a). Meanwhile, one of the longshoremen had procured from the dock a hose which was abreast of the #2 hatch and water from this hose was put on the fire (7a). Approximately 5 minutes after the fire started two of the ship's personnel

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descended into #2 hold to ascertain whether any of the longshoremen had failed to leave (9a). They found no one in the hold but, nevertheless, they themselves remained there some 10 to 15 minutes (9a, 10a). While in the hold, they noticed that the fire department of the City of Charleston had arrived on board the vessel (9a) by which time the fire had been extinguished (11a). The crew estimated that the fire department arrived about 10 minutes after the fire had started (11a).

ARGUMENT.

SUMMARY OF ARGUMENT.

(1) There are no circumstances presented by this petition which warrant the exercise by this Court of its judicial discretion to issue a writ of certiorari. There are no special or important issues for review by this Court. The judgments of the Courts below are not in conflict with the decisions of this Court or any Court of Appeals.

(2) Petitioners' contention that the Court of Appeals has decided important questions of federal law which now require settlement by this Court, is not valid. The decision below turned on a Coast Guard regulation which was amended about six months after the trial. Thus the regulation interpreted by the Court no longer has any effect on the working conditions aboard vessels. Petitioners contended on the trial that despite the plain words of the old regulation, which did not include "*unloading*", the regulation applied during *unloading* operations. The new regulation is now applicable to both loading and unloading so that the issue which Petitioners say should be settled by this Court has already been settled by the Coast Guard through the issuance of the new regulation.

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(3) Quite apart from the reasons given in its opinion, the Court of Appeals could only have affirmed the judgment of the Trial Court since the uncontradicted testimony established that the requirements of the old regulation, even if applicable, were fully complied with and, hence, a charge on an abstract principle of law would have been inappropriate.

(4) The Petitioners did not request the Court to charge in respect to the Coast Guard regulation according to its terms and did not except to the Court's failure to charge upon the consequences of a violation of the regulation. Hence, they should not now be heard to complain of any omission to charge on the subject.

I.

THE CONSTRUCTION OF THE REGULATION BY THE COURT OF APPEALS IS CORRECT.

Petitioners urged the Court of Appeals to decide that a phrase "each hatch through which sulphur is being *loaded*" means the same thing as if it read "each hatch through which sulphur is being *loaded or unloaded*". This interpretation cannot be found in the clear and unambiguous wording of the regulation and it is, therefore, impossible to see how the Court of Appeals could have arrived at any other result.

The opinion is clear and logical and Respondent adopts the reasoning of the Court of Appeals.

The following language of this court in *M. Kraus & Bros.* v. *United States,* 327 U. S. 614, p. 621 is appropriate here:

> "* * * In other words, the Administrator's provisions must be explicit and unambiguous in order

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to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See United States *v.* Wiltberger, 5 Wheat. (US) 76, 94-96, 5 L. ed 37, 42, 43. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

* * * But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States *v.* Resnick, 299 U. S. 207, 81 L. ed 127, 57 S. Ct. 126."

It follows that it would have been error for the Trial Court to have specifically charged that the regulation applied to the facts established.

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II.

THE DECISION OF THE COURT OF APPEALS HAS NO BEARING ON THE EXERCISE BY THE COAST GUARD OF THE STATUTORY POWERS GRANTED IT.

The decision of the Court of Appeals does not hinder or frustrate the Coast Guard in the promulgation and enforcement of any regulation that it may determine to be desirable and necessary in exercising the authority granted to it by statute. The Coast Guard is charged, among other things, with the duty of supervision over the safety of merchant vessels, and to accomplish this purpose is authorized to issue regulations. The decision of the Court of Appeals interprets one of the regulations issued pursuant to this statutory authority, but could not prevent the Coast Guard from changing that regulation so that the meaning would be wholly different from that of the earlier regulation as interpreted.

Furthermore, Petitioners do not suggest anywhere that the regulation as originally worded is applicable in respect to any other situation than the one before this Court or that any other suit is awaiting final determination by this Court as to the meaning of the old regulation.

Administration of the new regulation is in no way affected by what the Court of Appeals said about the old one.

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III.

THE COURT IS THE PROPER TRIBUNAL TO INTERPRET THE MEANING OF AN ADMINISTRATIVE REGULATION AND NOT THE COAST GUARD.

Petitioners, on the one hand, assert that the Court should properly interpret a Coast Guard regulation, but, on the other hand, assert that a contrary interpretation by the Coast Guard should be accepted. It is well established that this is not the law. *Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 299 U. S. 393; *Spellman* v. *American Barge Lines Co.*, 176 F. (a) 716 (CCA 3); *Wright & Michigan Central R. Co.*, 130 F. 843 (CCA 6).

On the trial, the Court erroneously admitted, over the objection of Respondent, a telegram interpreting the regulation, although the Coast Guard conceded that never previously had the regulation been interpreted by it. The actual enforcement of the regulation by the Coast Guard had for years been contrary to the interpretation contained in the telegram. (8a)

Thus Petitioners had the benefit of evidence, erroneously admitted, which was prejudicial to the Respondent. Petitioners had the advantage also of the erroneous ruling by the Trial Court that the regulation applied to *unloading operations*, which ruling the Court of Appeals subsequently reversed.

Despite these errors which were seriously prejudicial to the Respondent, the jury found that Respondent was not guilty of negligence, its vessel was seaworthy and that the Coast Guard regulation had not been violated.

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IV.

THE APPEAL DOES NOT LIE FROM AN ORDER DENYING A MOTION FOR REHEARING.

The law is clear that a party may not appeal from the denial of his application for rehearing.

U. S. v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 247; *Pfister* v. *Finance Corp.*, 317 U. S. 144, 149; *Conboy* v. *First National Bank of Jersey City*, 203 U. S. 141, 145.

In the guise of appealing from the denial of a rehearing by the Court of Appeals, Petitioners argue and allege facts which are not relevant to the sole point before this Court, *viz.* whether the Court of Appeals correctly interpreted the Coast Guard regulation. Many of the facts mentioned by Petitioners in their argument bear the taint referred to at the outset of this brief, but because of their irrelevancy no effort is now made to outline the inaccuracies. It is thought sufficient to say that matters which are irrelevant, even if true, will not be considered by this Court.

Petitioners refer to Rule 32 of the Revised Rules of this Court as a basis for extending their argument beyond the issue voluntarily stipulated. This rule has no relation whatever to Petitioners' transparent attempt to appeal a second time having failed on the first attempt. In the Court of Appeals, instead of designations by the parties as to the contents of the record on appeal, both parties stipulated as to the contents of the record and Petitioners have never asked to be relieved of this stipulation.

Moreover, the petition carefully avoids stating what additional facts, omitted from the record in the Court of Appeals, would justify reversal.

V.

THERE WAS NO PROOF TO ESTABLISH THAT THE COAST GUARD REGULATION WAS VIOLATED, EVEN THOUGH INTERPRETED TO APPLY TO UNLOADING.

The gist of Petitioners' argument is that they were entitled to a directed verdict because there was no "connection" maintained between a shore water supply and the ship's fire-fighting system. This is based on their erroneous interpretation of the regulation that when the Coast Guard used the word "available" it meant a "shore connection". Disregarding for the moment this extravagant interpretation, such a direction of a verdict against Respondent in the face of the evidence which Respondent had adduced would have been reversible error.

Petitioners, on page 18 of their petition, make the unjustifiable misstatement that there was an "admitted violation" of the Coast Guard regulation. No such admission was ever made. On the contrary, the proof showed full compliance with the regulation in all respects even as to that part of the regulation relating to the availability of a hose with fresh water.

The uncontradicted testimony was that a fire hose supplied with fresh water from a shore supply source was available at the hatch through which the sulfur was being *unloaded* and was actually used upon the fire (7a). Since this evidence could lead to the sole conclusion that the regulation of the Coast Guard was complied with, even if it were applicable to *unloading,* it would have been error for the Court to charge that a violation of that regulation constituted negligence *per se.*

A court should not charge on an abstract principle of law when there are no facts from which the jury could find upon the proposition of law as charged.

VI.

THERE WAS NO EXCEPTION TAKEN BY THE PETITIONERS TO THE FAILURE OF THE COURT TO CHARGE IN THE RESPECT COMPLAINED OF AND COUNSEL FOR THE PETITIONERS STATED AT THE CONCLUSION OF THE CHARGE THAT THEY HAD NO REQUESTS AND NO EXCEPTIONS.

At a conference in chambers prior to giving the charge, Respondent presented a number of requests, which were considered by the Court and passed upon. At the same time, Petitioners presented their proposals to charge and these likewise were discussed and passed upon. Thereafter, the Court set forth in writing the complete charge as he intended to deliver it and discussed this with counsel for the parties, and counsel had full opportunity, before addressing the jury, to consider the full text of the charge.

At the conclusion of his charge, the Trial Judge stated "I believe there are no other requests to charge, are there?" to which Mr. Klonsky[1] replied "No, your Honor" (30a; record in the Court of Appeals). Counsel for the Respondent then inquired of the Court whether the requests previously made on behalf of the Respondent had been recorded and was informed that they had been recorded. After some discussion between the Court and the Clerk in respect to the jurors, the following colloquy occurred (21a, Record Court of Appeals):

> Mr. Waring:[2] I am just asking that the record show that the exceptions made and discussed with

[1] Counsel for Petitioners (plaintiffs below).
[2] Counsel for Respondent (defendant below).

the Court in connection with the charge shall apply to the charge as given.

The Court: Yes, that is satisfactory. Didn't you have an exception?

Mr. Klonsky: I have no exceptions, your Honor.

Counsel for the Petitioners made it very clear to the Court that they were fully content with the charge of the Court as given. They now attempt to say that they had previously made their point and were not required to urge the Court further in the matter. However, from everything that occurred, Petitioners made clear to the Court that even though they may have previously wished to except, they finally desired to withdraw any exceptions previously indicated. The Court did not ask whether there were any further exceptions to be made but asked whether Petitioners "didn't" have an exception and elicited the response that the Petitioners had no exceptions.

It is submitted that at the termination of the trial, counsel for the Petitioners realizing that their position in respect of the alleged violation of the Coast Guard regulation was at best tenuous and believing that the jury would return a verdict in their favor on other grounds did not wish to inject any possible charge which might subsequently be held to be an error of law. Counsel for the Petitioners were abundantly contented with the charge as a whole and wished, therefore, to accept this charge without revision in order to avoid a possible setting aside of the verdict which they hoped to get. The Petitioners are now disappointed with the result of the verdict and so are complaining that the Court below did not do what the Petitioners at that time did not, in point of fact, wish the Court to do. If the Petitioners had actually wished the Court to correct any errors which they believed existed in connection with the charge, they would undoubtedly have urged their

requests and taken their exceptions when the Court invited them to do so.

In numerous decisions, it has been held that a claim of error is unavailable to a party in the absence of his request for instructions, and an objection to the instructions given. *Colley* v. *Standard Oil Co. of N. J.*, 157 F. 2d 1007 (CCA 4); *Meadows* v. *United States*, 144 F. 2d 751 (CCA 4); *Good Holding Co.* v. *Boswell*, 173 F. 2d 395 (CCA 5), cert. den. 338 U. S. 815; *Stueber* v. *Admiral Corp.*, 177 F. 2d 777 (CCA 7) cert. den. 336 U. S. 961.

CONCLUSION.

PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE (1) THE COURT OF APPEALS CORRECTLY INTERPRETED THE COAST GUARD REGULATION HOLDING THAT IT HAD NO APPLICATION TO AN UNLOADING OPERATION: (2) THE MEANING OF THE REGULATION IS NO LONGER IMPORTANT AND IS MOOT BECAUSE A NEW REGULATION HAS BEEN SUBSTITUTED: (3) THERE IS NOTHING ELSE IN THE CASE WHICH MERITS THE CONSIDERATION OF THIS COURT BY WAY OF DIVERSITY OF OPINION AMONG THE CIRCUITS OR OF THIS COURT OR OTHERWISE.

It is respectfully submitted that the petition should be denied.

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New York 5, New York,

Attorneys for Respondent, Marine Navigation Company, Inc.

APPENDIX.

Stipulation as to Contents of Record in Court of Appeals.

United States Court of Appeals

FOR THE FOURTH CIRCUIT.

No. 7141.

SAM MCHONEY, HERBERT DUNMEYER, JOHN SMITH, FRANKLIN WHITE, ROBERT JENKINS, CHAPEL MOUZON, LIMON JOYNER, FELIX MCKNIGHT, LUTHER MOORE, THOMAS BURCH and JOHN BOWENS,

Appellants,

vs.

MARINE NAVIGATION COMPANY, INC.,

Appellee.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that the sole issue on appeal from the final judgment entered in the cause in the United States District Court for the Eastern District of South Carolina, is as follows:

> Did the Court below err in failing to charge the jury as a matter of law that the U. S. Coast Guard regulation, referring to sulfur as a dangerously inflammable cargo and requiring a "fire hose supplied with fresh water from a shore supply source" at each hatch, was applicable herein during unloading of sulfur, and that the violation thereof constituted negligence per se?

IT IS FURTHER STIPULATED AND AGREED by and between counsel for the respective parties hereto that the following

shall constitute the entire record in the cause on appeal to the United States Court of Appeals for the Fourth Circuit; all or part of which may appear in either or both appendices of the parties herein.

1. All of the pleadings filed in the United States District Court for the Eastern District of South Carolina.

2. The Order for judgment of the United States District Court for the Eastern District of South Carolina dated December 9, 1954.

3. The judgment entered in the United States District Court for the Eastern District of South Carolina dated December 9, 1954.

4. The Opinion and Order of the Honorable Ashton H. Williams, United States District Judge, dated September 3, 1955.

5. A transcription of the Court Reporter's record of the charge to the jury of the Honorable Ashton H. Williams, United States District Judge.

6. A transcription of the Court Reporter's record of the colloquy between the Court and counsel following the charge to the jury.

7. The deposition as read on the trial of the ship's master, Karl Seitz, taken March 9, 1954.

8. A transcription of the Court Reporter's record of all statements made and agreements reached at a conference between the Court and counsel for the parties in Chambers on November 29, 1954.

9. A transcription of the Court Reporter's record of all statements made at a conference between the Court and

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counsel for the respective parties in Chambers on December 1, 1954.

10. The following extract from the closing argument to the jury of Charles W. Waring, Esquire:—

> "* * * Then they say, 'You should have had a hose attached to a shore installation.' Well now, the Coast Guard regulation in existence at that time states when sulphur is being unloaded—I mean, when sulphur is being loaded. That is what the regulations say. The Coast Guard now says that it is intended that that shall mean unloading as well as loading. But at that time, as Commander Thompson testified that his understanding of the meaning of that regulation was that it applied to loading and not to unloading.
>
> Well so much for the regulation. Let's say that it may have been the proper interpretation at that time, that it applied to unloading as well as loading. Suppose it did. Is there any testimony that you know of in this case that it would have helped put out that fire to have had fresh water available instead of salt water? Is fresh water any better for putting out a fire than salt water? Now what is the difference and what is the effectiveness of one against the other?"

plus that additional portion up to line 3, page 12.

11. A transcription of Court Reporter's record of objection by defendant, discussion thereon and Court's ruling in reference to offer of testimony through deposition of Karl Seitz regarding alleged failure to have hose supplied with fresh water from a shore supply source.

12. A transcription of the Court Reporter's record of the objection by defendant and the ruling of the Court dur-

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ing the testimony of Ensign Marshall as to applicability of the United States Coast Guard regulation with reference to the availability of a hose supplied with fresh water from a shore supply source.

13. Plaintiffs' Exhibit "11", consisting of teletype dispatches to and from the Commandant of the United States Coast Guard.

14. Defendant's Exhibit "L", consisting of teletype dispatches to and from the Commandant of the United States Coast Guard.

15. Extract from Plaintiffs' Exhibit "17" relative to the night relief engineer.

16. Plaintiffs' Exhibit "18", consisting of an excerpt from the log of the Charleston Fire Department.

17. Plaintiffs' Exhibit "2", consisting of Section N-347, Table K of the United States Coast Guard regulations appearing on page 5256 of the Federal Register Reprint Series No. 57-53.

18. The following extracts from the closing argument to the jury of Robert Klonsky, Esquire:—

> "• • • You have the violation of the Coast Guard regulation which has been interpreted to mean loading as well as unloading. The Navy Captain said there has never been a contrary interpretation. And the law is fixed, and a violation of that law is negligence.
>
> • • • • • •
>
> "• • • You remember very definitely that the Coast Guard regulation reads, and I will read it word for word:—

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'In the loading or unloading of sulphur in bulk, the following conditions shall be complied with: a fire hose supplied with fresh water from a shore supply source shall be available at each hatch through which sulphur is being loaded.'

* * * * * *

"Thereafter, we had Ensign Arnold Marshall, who came with a communication from the United States Coast Guard, and he presented to you the fact that the interpretation of a law, which is a binding interpretation from the date it started,—in this case, 1940, was that the hazards are equal and therefore the regulation applies to unloading as well as loading, with respect to having a shore supply source."

19. A transcription of the Court Reporter's record of the defendant's and plaintiffs' motions for a directed verdict.

20. The following statements setting forth in narrative form portions of the testimony of various witnesses at the trial of the cause:

(a) Caspar Miller, a witness for the Plaintiff testified that on February 5, 1952, he was employed as Superintendent of the Columbus Street Terminals, State Ports Authority, Charleston, South Carolina; that at the Columbus Street Terminal dock, where the SS. *Marine Merchant* was moored on that date, there were hydrants providing hose connections with a shore supply source of fresh water placed approximately 60 feet apart; that on the South end of the docks there were located three hydrants and that no hose connections were located beyond the end of the warehouse buildings; that the ship was moored toward the South end of the dock and abreast of where she was moored there were three fresh water hydrants at a distance of one foot from the side of the vessel; that he was in his

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office at the North end of the dock when the fire occurred and knows nothing in regard to the fire.

(b) Walter J. Kruger, a witness for the Defendant, testified that on February 5, 1952, he was a Stevedore Superintendent of the James Doran Company, which company was employed at that time to unload the SS. *Marine Merchant*; that a gang of longshoremen working under him was unloading the #2 hatch on the afternoon of that date; that at about 5 P. M. he was in an office on the dock about 100 feet from the #2 hold, when he heard a commotion outside and it was reported to him that a flash fire had occurred; that he ran on board and upon arriving found that there were 3 water hoses putting water into the hold, 2 of which were from connections on board the vessel and one of which was from a connection on the dock; that the hose from the dock was long enough to reach up over the main deck of the vessel; that when he arrived at the hatch, he saw smoke but no flame and at that time 2 or 3 longshoremen were still below; that the Fire Department arrived within 5 to 10 minutes after the witness reached the scene; that generally ships' hose are rolled upon the racks but sometimes a hose with water running from the nozzle, is laid out on the deck near the hatch being worked; that he does not remember whether there was any ship's hose laid out on the deck on the SS. *Marine Merchant* at the time of the fire; that sulphur, when being unloaded from a vessel, causes dust and sometimes catches fire; that he had never before seen a sulphur fire in the hold of a ship but he had seen fires on railroad cars, and the fires would go out by themselves.

(c) Frank Mathis, a witness for the Defendant, testified that he was employed by James Doran Company as a header on February 5, 1952; that his position was bossing the longshoremen in the unloading of the

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#2 hatch of the SS. *Marine Merchant* at the time of the fire; that as he came up the ladder and out of the mast house, which is forward of the #2 hatch, he heard hollering and noticed the smoke coming from the #2 hatch opening; that he went to where the ship's hose was located on the starboard side of the mast house and found that this hose was coiled up in the box and he could not get water out of it; that he then got from the dock a hose which was near at hand, right by the #2 hatch and with that put water in the hold; that after he got the dock hose in operation the ship's crew put water on the fire from two ship's hose; that he does not know how long these hoses were in operation before the Fire Department got there but that all of the men were out of the hold before the Fire Department arrived; that he did not see any ship's hose laid out on the deck with water running from it before the fire broke out.

(d) Willie Butler, a witness for the Defendant, testified that he was employed by James Doran Company as a hatch tender on February 5, 1952; that on the afternoon of that date he was working at the #2 hatch on board the SS. *Marine Merchant*; that his duties required him to stand on the main deck, just aft of the #2 hatch, in order to give signals to the winch operators; that at about 5 o'clock in the afternoon he saw a flash fire occur in the #2 hold and this was followed by a lot of smoke which billowed out of the hold; that the first hose put on the fire was from the dock and afterward two ship's hose were used to put water on the fire; that before the fire broke out there was a ship's hose laid out on the deck, near the aft end of the midsection of the #2 hatch, and water from this hose was put into the hold; that he does not know how long it took the Fire Department to arrive after the fire first commenced but water was put into the hold before the Fire Department arrived.

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(e) J. D. Thompson, a witness for the Defendant, testified that on February 5, 1952, he was and that he is a Commander in the United States Coast Guard in charge of Marine Inspection Office in Savannah, Georgia, and was authorized by the Commandant of the Coast Guard to testify in the cause. The witness produced a communication from the Captain of the Port to the Commandant of the United States Coast Guard, and the answer thereto, which are in evidence marked Defendant's Exhibit "L". The witness further testified that in connection with his inspections of sulphur vessels, he had previously had occasion to apply Subsection 6 of the Coast Guard regulation referring to availability of hose from a shore supply source of fresh water and he had interpreted such regulation to mean that it was not applicable during unloading of sulphur from a vessel; that he had inspected the SS. *Marine Merchant* on December 6, 1951, and had found all safety appliances in order; that he had examined and tested the ship's hose and other fire fighting equipment and found that they met Coast Guard requirements; that as a result of his inspection he had given a certificate to the vessel, certifying as to the safety of the vessel and its appliances; that his inspection included safety of personnel as well as safety of the vessel.

(f) Karl Seitz, a witness for the Defendant testified that he was the Master of the SS. *Marine Merchant* on February 5, 1952; that there had been no change in any of the safety appliances and equipment aboard the vessel since the inspection made by Commander Thompson on December 6, 1951; that when the fire broke out aboard the vessel at about 5 o'clock on February 5, 1952, he was in his office located behind the wheel house on the bridge deck; that after the relief mate rang the general alarm it took him about one-half minute to get to the scene of the fire at the #2 hatch;

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that the general alarm bell rings throughout the ship; that when he arrived at the #2 hatch, dense smoke was coming out of the hold, crew members were putting water from one hose into the hold and were bringing another hose to bear from another hydrant; that he also saw two stevedores operating a hose; that the Fire Department did not arrive at the scene until 5 minutes after he received his first notice of the fire; that the Fire Department first used water and then foamite; that before the Fire Department arrived, crew members put a Jacob's ladder into the hold and went down to see if any longshoremen were still there, but found none.

(g) Edward E. Gavin, a witness for the Defendant, testified that on February 5, 1952, he was an able bodied seaman employed aboard the SS. *Marine Merchant*; that when the fire in the #2 hold broke out he was in the mess hall and when he heard the general alarm he ran out on the main deck, a distance of around 40 feet; that he saw smoke coming out of the hold and a lot of people around the #2 hatch; that he noticed that a fire hose was being taken out of the rack but is not sure whether any hose was being trained on the fire at that time; that he and another crewman got a Jacob's ladder and put it into the hold and went down to search for any remaining longshoremen; that it was about 3 minutes from the time he arrived on the scene until the time he went into the hold and by that time water had been put into the hold; that he remained in the hold about 10 or 15 minutes and during that time there was a lot of water put down in the hold; that there were no flames, just smoke; that he found no one down there; that when he came up out of the hold the Fire Department was there but he does not know when it arrived; that the first hose brought to bear upon the fire was from the #3 hydrant, which is located forward of the

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midship's house; that he does not remember whether any hose from a shore supply source was brought to bear upon the fire.

(h) Anthony J. Arent, a witness for the Defendant, testified that on February 5, 1952, he was employed as the second assistant engineer on the SS. *Marine Merchant*; that he was standing on the boat deck when he noticed smoke coming from the #2 hold, immediately ran down to the engine room, pushed the steam valve on the fire pump and increased the water pressure on the fire lines and that full pressure was obtained within 30 seconds from the time that he turned on the valve; that not more than 2 minutes elapsed between the time that he first saw the smoke and the time that full water pressure was obtained on the fire lines; that the night engineer was in the engine room at the time that the witness turned on the steam valve and took over the watch from the witness; that he went back on the main deck to the #2 hatch and went down the Jacob's ladder into the hold to search for any longshoremen remaining; he stayed in the hold from 10 to 15 minutes but found no one.

(i) Robert P. Ruse, a witness for the Defendant, testified that on February 5, 1952, he was employed as chief mate on the SS. *Marine Merchant*; that on the main deck of the vessel there were 9 fire stations with hose attached; that the #1 fire station was aft of the anchor windlass on the port side forward of the #1 hold; that the #2 fire station was on the starboard side at the mast house between the #1 and #2 holds; that the #3 fire station was on the port side between the #2 and #3 holds; that the #4 fire station was on the starboard side on the bulkhead of the midships house; that he was in his office one deck above the main deck and about 75 feet from the #2 hatch when the night relief mate ran in and told him there was a fire in the

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#2 hold; that he directed the night relief mate to sound the general alarm and increase the water pressure; that within 10 to 15 seconds the general alarm rang, and the witness went down on deck to the scene of the fire; that several crewmen arrived at the #2 hatch at about the same time as the witness; that he saw the #3 hose laid out on the deck with water trickling from it under low pressure and within one-half minute a full head of water was put into the hold by the crew members manning this hose; that shortly thereafter the #2 hose was taken from the rack and put in operation on the fire; that he was not aware of a hose in use from a shore connection until later but did see one after the Fire Department arrived; that the Fire Department came to the scene about 10 minutes after the witness arrived on the main deck; that he did not observe any flames in the hold and the smoke cleared up in about 15 minutes; that prior to the fire, the #3 hose was laying on the deck with its nozzle through a scupper or chock and water trickling out of it over the side of the vessel.

(j) Gilbert Morgan, a witness for the Defendant, testified that on February 5, 1952, he was employed as boatswain on the SS. *Marine Merchant*; that he heard the general alarm sound and went to the main deck near the #2 hatch; that on arrival, he found the #3 hose in operation with water directed on the fire; that he then stretched out the #2 hose and turned on the valve, thereby obtaining immediate water pressure; that he put the #2 hose on the fire in the hold; that he did not notice whether any longshoremen were still in the hold when he reached the #2 hatch; that he saw crew members go into the hold within 4 or 5 minutes after his arrival and they remained below about 10 to 15 minutes while water was directed into the hold; that the #3 hose was laid out on the deck at 8:00 A. M. on February 5, 1952, with its nozzle through the chock, dribbling water over the side.

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(k) Manual Frietas, a witness for the Defendant, testified that on February 5, 1952, he was employed as an ordinary seaman on the SS. *Marine Merchant*; that when he was in the mess hall he heard the general alarm and went to the main deck at the #2 hold; that the master and chief mate were at the scene when he arrived; that he directed water from the #3 hose upon the fire in the hold under the supervision of the chief mate; that at first a small trickle was coming out of the #3 hose but in a half minute a full pressure of water came from that hose and was put into the hold; that a few minutes later the #2 hose was directed on the fire; that the Fire Department arrived about 10 or 15 minutes after the witness reached the scene of the fire; that he does not recall the use of any shore hose until after the arrival of the Fire Department; that he saw two crew members go into the hold within 5 or 10 minutes after he got to the scene and they remained below for about 10 to 15 minutes.

21. Testimony of William Schirmer.

22. Defendant-appellee is not hereby precluded from incorporating in its appendix any testimony of any witness or other parts of the proceedings below whether referred to or not in this stipulation.

ROBERT KLONSKY,
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Attorneys for Appellants.

CHARLES W. WARING,
WALTER X. CONNOR,
Attorneys for Appellee.

March 8, 1956.

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Extract from Table K of Coast Guard Regulation.

46 Code of Federal Regulations (Cumulative Supplement) §146.27-100, pages 11120-11121.

In the loading or unloading of sulphur in bulk the following conditions shall be complied with:

(a) When sulphur in bulk is loaded in a deep hold with general cargo in the Tween Deck hold above the sulphur a dust proof wooden bulkhead inclosure shall be built in the hatchways from the over deck of the lower hold to the weather deck forming a tight enclosure to prevent sulfur dust entering the Tween Decks during loading.

(b) Holds shall be cleaned of all debris.

(c) Ceiling shall be made tight to prevent sulfur dust finding its way into the bilges; any chinking necessary in the way of tank tops or bilges shall be with non-combustible material.

(d) In order to minimize the movement of fine sulfur dust during the loading, cowl ventilators serving the hold into which the sulfur is being loaded shall be blanked off to prevent circulation of air.

(e) "NO SMOKING" signs shall be conspicuously displayed, and the officer in charge of loading shall see that they are observed.

(f) An oxygen breathing apparatus, or proper gas mask, shall be made readily available.

(g) *A fire hose, supplied with fresh water from a shore supply source, shall be available at each hatch through which the sulfur is being loaded.* (italics ours)

(h) Upon completion of loading, the sulfur shall be leveled off and the sulfur dust deposited during the process of loading, being extremely inflammable, shall be cared for by sweeping or washing it down. This applies to the decks and to the overhead structure within the holds.

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Extract from Table K of Coast Guard Amended Regulation.

(j) After unloading, all residue of sulfur dust shall be thoroughly cleaned out of cargo holds before loading other cargo therein.

(k) When sulfur is loaded by metal chute method, provision shall be made for proper grounding of the chute, using flexible cable to prevent static discharge.

Extract from Table K of Coast Guard Amended Regulation.

46 Code of Federal Regulations 146.27-100 (June 10, 1955).

NOTE: In the loading, handling and unloading of sulphur in bulk the following conditions shall be complied with:

(a) When sulphur in bulk is loaded in a deep hold with general cargo in the tween deck hold above the sulphur a dust proof wooden bulkhead enclosure shall be built in the hatchways from the over deck of the lower hold to the weather deck forming a tight enclosure to prevent sulphur dust entering the tween decks during loading.

(b) Holds shall be cleaned of all debris.

(c) Ceiling shall be made to prevent sulphur dust finding its way into the bilges; any chinking necessary in the way of tank tops or bilges shall be with non-combustible material.

(d) In order to minimize the movement of fine sulphur dust, cowl ventilators serving the hold into which sulphur is being loaded or discharged shall be blanked off to prevent circulation of air.

(e) "No Smoking" signs shall be conspicuously displayed, and the officer in charge shall ensure that they are observed.

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Extract from Table K of Coast Guard Amended Regulation.

(f) An oxygen breathing apparatus, or proper gas mask, shall be made readily available.

(g) *A fire hose, preferably supplied with fresh water from a shore supply source, shall be available at each hatch through which sulphur is being worked.* (italics ours)

(h) Upon completion of loading, the sulphur shall be leveled off and the sulphur dust deposited during the process of loading, being extremely inflammable, shall be cared for by sweeping or washing it down. This applies to the decks and to the overhead structure within the holds.

(j) After unloading, all residue of sulfur dust shall be thoroughly cleaned out of cargo holds before loading other cargo therein.

(k) When sulfur is loaded by metal chute method, provision shall be made for proper grounding of the chute, using flexible cable to prevent static discharge.

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